WISCONSIN SUPREME COURT CALENDAR

AND CASE SYNOPSES

September 2005

This calendar contains cases that originated in the following counties:

Brown
Chippewa
Dane
Douglas
Milwaukee
Sauk
Waukesha
Winnebago
Wood

These cases will be heard in the Wisconsin Supreme Court Hearing Room, 231 East Capitol:

WEDNESDAY, SEPTEMBER 7, 2005

9:45 a.m.	03AP421	Dairyland Greyhound Park, Inc. v. James E. Doyle
10:45 a.m.	04AP239	Rainbow Cty. Rentals v. Ameritech Publishing
1:30 p.m.	04AP1594-FT	Megal Development Corporation v. Craig Shadof

THURSDAY, SEPTEMBER 8, 2005

9 a.m.	04AP1305/1306	Brown County v. Shannon R.

FRIDAY, SEPTEMBER 9, 2005

9:45 a.m.	04AP958-CR/1609-CR	State v. Bill Paul Marquardt
10:45 a.m.	03AP3055-CR	State v. Rachel W. Kelty

TUESDAY, SEPTEMBER 27, 2005

9:45 a.m.	03AP2755	John Marder v. Bd. of Regents of the UW System
10:45 a.m.	03AP2668	All Star Rent A Car, Inc. v. Wisconsin DOT
1:30 p.m.	03AP3349	Sauk County v. Aaron J.J.

WEDNESDAY, SEPTEMBER 28, 2005

9:45 a.m.	03AP2865	The Warehouse II, LLC v. State of Wisconsin DOT
10:45 a.m.	04AP2330/2331	State v. Robert K.
1:30 p.m.	03AP1307	K. Haferman v. St. Clare Healthcare Foundation

FRIDAY, SEPTEMBER 30, 2005

9:00 a.m.	04AP630-CR	State v. Forest S. Shomberg

In addition to the cases listed above, the court will consider and determine on briefs, without oral argument, the following cases. Background summaries are not available.

03AP517-D	Office of Lawyer Regulation v. Edwin W. Conmey (Oconomowoc)
03AP2422-D	Office of Lawyer Regulation v. Carlos Gamino (Waukesha)

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 7, 2005
9:45 a.m.

03AP421 Dairyland Greyhound Park, Inc. v. James E. Doyle

This is the second time the Wisconsin Supreme Court has heard oral argument in this case. The first oral argument was heard in January 2004. Two months later, the Supreme Court – with one justice not participating in the case – announced that it had reached a tie vote and vacated its certification, sending the matter back to the Court of Appeals, which again certified it to the Supreme Court. The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Dane County Circuit Court, Judge Richard Callaway presiding.

This case focuses on Indian gaming in Wisconsin. In this case, the Supreme Court will determine whether the governor has the authority to extend Indian gaming compacts in Wisconsin. In particular, the Court will focus on whether a 1993 constitutional amendment was intended to stop this type of gambling in Wisconsin.

Here is the background: In 1991 and 1992, Gov. Tommy Thompson negotiated gaming compacts with 11 Wisconsin Indian tribes, allowing them to open and operate casinos in the state. In 1993, the Wisconsin Constitution was amended to limit gambling in Wisconsin. On-track pari-mutuel betting was still permitted, as was the state lottery without casino-type games. The amendment reads in part:

> Notwithstanding the authorization of a state lottery … the following games … may not be conducted by the state as a lottery … [including] poker, roulette, craps …

Dairyland Greyhound Park contends that this amendment was intended to end Indian gaming in Wisconsin. According to Dairyland, the casinos have been operating illegally since 1993. This lawsuit, originally filed against Gov. Scott McCallum, seeks to stop Gov. Jim Doyle from renewing or extending the gaming compacts.

The circuit court disagreed with Dairyland, finding that – as the governor argues – the constitutional amendment was not intended to, and does not, have an effect on the compacts.

The Court of Appeals determined that these issues should be addressed directly by the Supreme Court, which accepted the Court of Appeals' certification and heard the case in January 2004 but reached a tie vote. Chief Justice Shirley S. Abrahamson and Justices Ann Walsh Bradley and N. Patrick Crooks would have affirmed the circuit court while Justices David T. Prosser Jr., Diane S. Sykes, and Patience D. Roggensack would have reversed. Justice Jon P. Wilcox is not participating in this case. The Supreme Court then sent the case back to the Court of Appeals for a decision and the Court of Appeals responded with a new request to certify the matter. The Supreme Court agreed to take it up again.

The panel that will hear the case is different than the original panel. It no longer includes Justice Diane S. Sykes, who now serves on the federal Court of Appeals. Justice Louis B. Butler Jr. succeeded Sykes.

On the same day that the Court originally heard this case in January 2004, it also heard oral argument in a case that raised related issues, Panzer v. Doyle. In that case, the Court considered whether the governor had the authority to enter into a perpetual compact with the Forest County Potawatomi (that is, a compact that would not end unless both the state and the tribe agreed to end it) and concluded, on a 4-3 vote, that he did not have this authority.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 7, 2005
10:45 a.m.

04AP239 Rainbow Country Rentals and Retail, Inc. v. Ameritech Publishing, Inc.

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Waukesha County Circuit Court, Judge Lee S. Dreyfus presiding.

This case involves a business whose Yellow Pages ad was mistakenly left out of the Ameritech phone book. The Supreme Court will decide if the business may sue Ameritech for damages resulting from a loss of business.

Here is the background: Rainbow Country Rentals and Retail Inc. contracted with Ameritech Advertising Services for listings of Rainbow's Oconomowoc Rental Center in the 1999 Ameritech Yellow Pages for Oconomowoc and Waukesha and in the 2000 edition for Watertown. None of the listings appeared.

Rainbow sued Ameritech for business losses allegedly caused by its non-appearance in the Yellow Pages. Ameritech responded by pointing out that the contract limited its liability to the cost of the ads (about $5,000). The circuit court ruled in favor of Ameritech, although the judge acknowledged that the Wisconsin Supreme Court in a 1984 case[1] that arose from a dropped Yellow Pages ad held that a contract that limited the telephone company's liability for botched or missing ads ran contrary to sound public policy because such a contract protected a monopoly.

In this current case, however, the trial court noted that there are now several Yellow-Pages-type directories published by various competing phone companies and that Rainbow was not forced to contract with Ameritech in order to get its message out.

Rainbow appealed, and the Court of Appeals, noting that deregulation of the telecommunications industry has resulted in at least four competitors for telephone services in the plaintiff's area, concluded that the Supreme Court might want to reconsider its 21-year-old decision that a contract that limits the telephone company's liability in this circumstance violates public policy.

The Supreme Court accepted the Court of Appeals' certification and will determine if Rainbow may proceed with its lawsuit against Ameritech for damages allegedly resulting from the missing ad.

[1] Discount Fabric House of Racine, Inc. v. Wisconsin Telephone Company, 117 Wis. 2d 587, 345 N.W.2d 417 (1984)

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 7, 2005
1:30 p.m.

04AP1594-FT Megal Development Corporation v. Craig Shadof

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Waukesha County Circuit Court, Judge Mark S. Gempeler presiding.

This case asks the Supreme Court to determine the level of protection from creditors the Legislature meant to give people who file for bankruptcy.

Wisconsin law[2] permits an individual who has secured a bankruptcy judgment to apply to the circuit court for an order saying that s/he has satisfied the judgments that were discharged (erased in the bankruptcy). The entry of an order of satisfaction eliminates all claims on the discharged debts that are pending against the debtor. However, federal law makes it clear that only the individual's liability, and not *in rem* liability (the liability that attaches to property, rather than people) may be erased in bankruptcy. The Supreme Court will decide whether creditors may make claims against a bankrupt individual's homestead (the house in which the person lives) in cases where home equity exceeds the amount ($40,000) that a debtor is allowed to exempt in the bankruptcy.

Here is the background: In March 1994, Megal Development Corporation sued Craig and Susan Shadof. The court granted Megal a judgment of eviction and money damages of more than $40,000. Nine years later, in February 2003, the Shadofs filed for Chapter 7 bankruptcy relief in the federal court in Milwaukee. Chapter 7 permits individuals to wipe out many or all of their debts in exchange for giving up most of their valuables – expensive clothing, cars, jewelry, electronics, and most of the equity in their homes. There are a few items that are exempt, and the debtor is allowed to protect these in the bankruptcy. In Wisconsin, the exempt items include a maximum of $40,000 in a homestead.

The Shadofs were granted their $40,000 homestead equity exemption. They listed the Megal judgment as a dischargeable debt on their bankruptcy forms and it was discharged. After the bankruptcy court acted, the Shadofs went to Waukesha County Circuit Court to request judgments indicating that their debt to Megal and the judgment lien had been satisfied.

Megal objected, pointing out that the Shadofs' equity in their home now exceeded the $40,000 that was exempt from the bankruptcy. Megal requested that the homestead be ordered to pay off the debt. The trial court ruled in favor of Megal, and the Shadofs appealed. The Court of Appeals, citing the federalism issue and the significant interests of creditors and debtors that are at stake in this case, certified the matter to the Supreme Court.

The Supreme Court will decide whether the Megal claim against the Shadofs' non-exempt, excess homestead value is legal.

---

[2] Wis. Stat. § 806.19(4)

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 8, 2005
9 a.m.

04AP1305} Brown County v. Shannon R.
04AP1306}

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a summary judgment of the Brown County Circuit Court, Judge John D. McKay presiding.

This case involves the termination of a mother's rights to her two sons, who are now 3 and 4 years old. The mother, Shannon R., has raised numerous issues in her appeal, including whether the Indian Child Welfare Act (ICWA) requires that the county prove beyond a reasonable doubt each of its allegations.

Here is the background: Darell, 4, was removed from his mother's care when he was less than a month old. Daniel, 3, was removed at birth. The father of these two boys is a member of the Bad River tribe and both children are eligible for enrollment in the tribe, which means they qualify as Indian children under the ICWA. The Bad River tribe declined to assert jurisdiction in this case and the father did not contest the termination of his parental rights.

Brown County petitioned to terminate Shannon's rights to both children at separate times and those petitions were consolidated on Sept. 4, 2003. The judge initially assigned to hear the consolidated cases was unable to accommodate them on his calendar in a timely fashion and submitted them to the district court administrator for assignment to another judge.

Shannon's initial appearance was held on Oct. 23, 2003. The timing forms the basis of one of Shannon's issues on appeal. She claims that the circuit court lost competency to proceed because it did not hold a hearing within 30 days of the filing of the TPR petition. The Court of Appeals disagreed, acknowledging that Wisconsin law[3] does require an initial hearing within 30 days, but concluding that an exception in the law for reasonable delays caused by the "disqualification" of a judge applies in this case. A reassignment due to a packed calendar, the Court of Appeals said, amounts to a "disqualification." In the Supreme Court, Shannon argues that the reassignment burned just two days, and that the mandatory 30-day window was missed by more than that. A jury trial was held and the jury found grounds to terminate Shannon's parental rights. An order effectuating this decision was filed on Feb. 11, 2004.

Shannon's next claims arise from the conduct of the trial. She argues that the expert witness who testified in favor of terminating her parental rights never met with her, the children, or the social workers and that her attorney was ineffective for failing to object to this testimony and to the wording of the jury instructions, which held the county to a "clear and convincing evidence" burden of proof on certain issues, which is lower than the "beyond a reasonable doubt" proof required under the ICWA. Again, the Court of Appeals affirmed the trial court, finding that the jury's answers to the two questions that were presented with the higher burden of proof were sufficient on their own to terminate her parental rights.

The Supreme Court will handle these and other issues in determining whether Shannon's parental rights were properly terminated.

---

[3] Wis. Stat. § 48.422(1)

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 9, 2005
9:45 a.m.

04AP958-CR } State v. Bill Paul Marquardt
04AP1609-CR}

This is a certification from the Wisconsin Court of Appeals, District III (headquartered in Wausau). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Chippewa County Circuit Court, Judge Roderick A. Cameron presiding.

These appeals arise from a police search of an Eau Claire County residence. The Supreme Court is expected to use this case to clarify several matters relating to the admission of evidence in criminal proceedings. Specifically, the Court will examine the application of the good-faith exception to the exclusionary rule and the doctrine of inevitable discovery.

The good-faith exception to the exclusionary rule covers situations in which police believe they have secured a valid search warrant, collect evidence, and then discover that the warrant was flawed. The good-faith exception says this evidence might be admissible in spite of the constitutional violation. The doctrine of inevitable discovery says that illegally obtained evidence that would likely have been discovered anyway is generally admissible in court.

Here is the background: Bill P. Marquardt's mother was found murdered in her Chippewa County home on March 13, 2000. Police attempted to contact Marquardt at his cabin in Eau Claire County and learned from his neighbor that the neighbor's dog had been shot several days before Marquardt's mother's body was discovered. Police collected shell casings from the neighbor's yard and secured a search warrant for Marquardt's residence. They found animal carcasses and firearms in his home and issued a warrant for his arrest on charges of animal cruelty.

Police then applied for and received a warrant to search Marquardt's home. Soon after they conducted the search, crime lab tests were completed and matched shell casings from the neighbor's yard to the gun used to kill Marquardt's mother. This evidence, combined with blood on Marquardt's shoes and on a folding knife he was carrying when he returned home several days later from a trip to Florida led prosecutors to charge him with his mother's murder.

Two separate cases against Marquardt – the animal cruelty case in Eau Claire County and the homicide case in Chippewa County – moved forward. The animal cruelty charges resulted in a conviction after which Marquardt was found not guilty by reason of mental disease or defect and was committed to an institution. His appeal of that conviction raises several issues including whether the search of his cabin was legal. The judge in that case concluded that, while the search warrant did not contain adequate information, the search itself was legal because the officers believed they had a valid warrant. The good-faith exception applied.

The Chippewa County Circuit Court, however, reached the opposite conclusion and the homicide has arrived at the Supreme Court by appeal from the State. The Chippewa court found that the search was illegal because there was not sufficient information presented in the warrant application to support probable cause. The Chippewa judge ruled that the search warrant

application was so lacking in probable cause that a reasonably well-trained officer should have known that the search was illegal in spite of the authorization. Having decided that the good-faith exception did not apply, the judge suppressed the evidence that police had seized from Marquardt's cabin. The Court of Appeals certified the matter to the Supreme Court. The homicide case is now on hold pending the outcome of this appeal to the Supreme Court.

In the Supreme Court, the State argues that police had – and shared with the district attorney – more evidence of Marquardt's probable involvement in the crime than was presented in the search warrant application. The Supreme Court will decide whether information that is known to police but excluded from a warrant application can be considered in determining whether the officers acted in good faith, and will determine whether the evidence gathered from Marquardt's cabin may be used in the homicide case against him.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 9, 2005
10:45 a.m.

03AP3055-CR State v. Rachel W. Kelty

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a summary judgment of the Wood County Circuit Court, Judge James M. Mason presiding.

This case involves a woman who is serving 25 years in prison for child abuse. The questions before the Supreme Court are (1) whether the woman, in pleading guilty as part of a plea agreement, waived her right to challenge the convictions on double-jeopardy grounds, and (2) whether – if she ultimately were successful in establishing double jeopardy – the proper remedy would be to toss out the plea agreement and reinstate all of the charges that were dismissed in exchange for the defendant's guilty pleas, or simply to dismiss one of the two duplicitous charges.

Double jeopardy is the unconstitutional practice of putting a defendant on trial twice for one crime. Double jeopardy begins with duplicitous or multiplicitous charges. The defendant in this case claims that the district attorney illegally filed multiplicitous charges against her; the State claims that the two charges were legitimate and that the defendant relinquished her right to raise double jeopardy claims when she chose to plead guilty.

Here is the background: On Sept. 14, 2000, a then-16-month-old baby was beaten at a Wisconsin Rapids home where his aunt was babysitting him. The aunt told police that her friend, Rachel W. Kelty, who was 17 at the time, had been alone in the room with the baby and came downstairs with blood on her clothing. The aunt testified that she checked on the baby and found that he had been beaten. She called 911 and the baby was taken by Med-Flight to St. Joseph's Hospital in Marshfield where he underwent emergency surgery. A neurosurgeon later testified that it appeared he was hit in the head with a hammer-like object and with a sharp, cutting object. The doctor opined that either of the objects could have killed the child.

Kelty was charged with two counts of physical abuse of a child. The criminal complaint noted there were two skull fractures apparently caused by two blows with two separate objects. She pleaded guilty to two reduced charges of first-degree reckless injury in a plea agreement that reduced her potential maximum sentence from 128 years to 41½ years. The judge accepted her plea and sentenced her to a total of 25 years in prison.

Kelty later filed a motion to withdraw her guilty pleas, arguing that she had not realized that the charges might be multiplicitous. She argued that she had been denied effective assistance of counsel. The trial court denied her motion, concluding that the charges had not been multiplicitous because they referred to two separate acts and that, even if they had been, Kelty had waived her right to object when she entered the pleas.

Kelty appealed, and the Court of Appeals (with one judge dissenting) reversed the convictions. The majority did not determine if the charges were multiplicitous, but reversed based upon the fact that the trial court had not asked Kelty to expressly waive the right to challenge the convictions on double jeopardy grounds.

The Court of Appeals sent the case back to the circuit court, but it has been put on hold pending this appeal by the State.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 27, 2005
9:45 a.m.

03AP2755 John Marder v. Board of Regents of the UW System

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a summary judgment of the Douglas County Circuit Court, Judge Robert E. Eaton presiding.

This case involves a UW-Superior professor who was terminated from his tenured position for misconduct. The Supreme Court will clarify the due process protections available to tenured faculty members who are facing termination.

Here is the background: John Marder was granted tenure at the UW-Superior Department of Communicating Arts in 1994. In 1995 and 1996, two female students alleged that he had behaved inappropriately around them. While no finding of sexual harassment was made, Chancellor Julius Erlenbach issued a letter of reprimand labeling Marder's behavior "unprofessional." Marder was told to seek counseling and was required to apologize.

Marder received less-than-satisfactory peer evaluations for the academic terms between 1996-99 (which he appealed claiming they were colored by personal animosity; those appeals are unresolved) and complaints from students over his handling of his duties as advisor to the student newspaper and specifically his distribution of confidential materials related to personal and professional disputes between himself and the department secretary. In 1997, the Department of Communicating Arts voted during a departmental meeting to relieve Marder of his duties as newspaper advisor.

His colleagues in the department testified that his frequent recording of departmental meetings, his practice of writing lengthy, accusatory memoranda to them on various issues, his filing of complaints against them with the administration, and his practice of providing information to the local media on department personnel matters contributed to a difficult working environment. The department chair filed a complaint against Marder. The investigation (by a professor from another department) resulted in a report recommending discipline.

On June 28, 2001, the Board of Regents terminated Marder from his position as an associate professor of journalism at UW-Superior. Marder sued the Board. The circuit court concluded that the Board had not followed appropriate procedure. The Board appealed, and the Court of Appeals – while finding that the board had violated its own regulations by meeting with the chancellor outside of Marder's presence – reversed the circuit court's finding that the Board had violated Marder's due process rights. The Court of Appeals sent the case back to the circuit court for a determination on whether anything new and material to the case had been discussed at the meeting that Marder was not privy to, and, if so, what the appropriate remedy would be. Marder, who had sought a reversal of the board's decision to terminate him, then appealed to the Supreme Court.

The Supreme Court will clarify the due process protections available to a tenured faculty member who is facing dismissal.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 27, 2005
10:45 a.m.

03AP2668 All Star Rent A Car, Inc. v. Wisconsin DOT

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a summary judgment of the Dane County Circuit Court, Judge Moria Krueger presiding.

This case involves a rental car company that appealed a ruling of the Division of Hearings and Appeals (DHA) that revoked its license to sell motor vehicles. The company named the Department of Transportation (DOT) rather than the DHA in court papers and its complaint was dismissed as a result. The Court of Appeals reversed the circuit court's decision to dismiss the complaint, and now the Supreme Court is expected to clarify the procedure for appeals of DHA rulings on DOT matters.

Here is the background: In 2002, the DOT began proceedings to revoke the car-dealer license of All Star Rent A Car, Inc., a Madison car dealership, based upon two incidents:

- In 2001, All Star allegedly sold a 1997 Ford Explorer that had been in an accident. According to one mechanic, its frame was bent like an accordion. The vehicle's condition was not revealed to the buyers. When they discovered the damage and requested that All Star buy back the car, All Star did not make an offer the buyers found acceptable.

- In 2002, All Star sold, through E-Bay, a 1992 Mercury Sable to an Iowa man who attempted to get his deposit back when he discovered that the odometer reading didn't add up. All Star allegedly then sold the car to another individual and took six months to return the Iowa man's deposit.

The DHA hearing examiner revoked All Star's license and All Star took its case to the circuit court. The court dismissed the matter after concluding that it did not have competency to proceed because All Star had not served the DHA with its petition for review within 30 days as required by law. All Star had instead served the papers on the DOT.

All Star appealed and won. The Court of Appeals ruled that the statute was ambiguous and that All Star had acted "reasonably" by naming the DOT rather than the DHA.

Under Wisconsin law, all entities that handle motor vehicles must obtain a motor-vehicle-dealer license from the DOT. A licensee who disagrees with a DOT licensing decision may appeal to the DHA, where a hearing examiner listens to both sides and issues a decision. The losing side may then appeal that decision by taking the matter to the Dane County Circuit Court.

Until 1993, appeals of DOT decisions took a somewhat different route, and the change is the reason the Court of Appeals found the law ambiguous. The appeals used to go to the Office of the Commissioner of Transportation and, from there, could go to the circuit court. However, in 1993, the Legislature abolished the Office of the Commissioner of Transportation and transferred its functions to the DHA.

The Supreme Court will resolve any ambiguity that exists and will determine whether All Star will have an opportunity to go to court in order to make a case for keeping its dealer license.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 27, 2005
1:30 p.m.

03AP3349 Sauk County v. Aaron J.J.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a summary judgment of the Sauk County Circuit Court, Judge Guy D. Reynolds presiding.

This case involves a boy who was detained for psychiatric treatment after he exhibited erratic behavior. The Supreme Court is expected to decide whether a circuit court may, without conducting a colloquy, accept a person's agreement to be committed to a mental institution.

Here is the background: Police placed Aaron on an emergency detention because he allegedly assaulted his mother and resisted the officers who attempted to take him into custody. The circuit court concluded after a hearing that Aaron was a danger to himself or others and was mentally ill. Pending a final hearing, the judge ordered Aaron detained at Mendota Mental Health Institute, examined by a psychiatrist and a psychologist, and given medication regardless of whether he consented.

At the final hearing on the commitment, Aaron and his attorney stipulated that grounds for a commitment existed but argued against the order for involuntary medication. The judge ordered a six-month commitment and ordered the medication continued. The judge based the latter ruling upon the testimony of a psychiatrist, who said Aaron did not understand the advantages and disadvantages of the medications prescribed for his condition.

Aaron later moved to vacate the commitment order, arguing that the trial court had violated his right to due process by not engaging him in a question-and-response session to ascertain whether his agreement not to contest the commitment was voluntary. The trial court concluded that there was no requirement in the law[4] that courts conduct such a colloquy.

Aaron appealed, and the Court of Appeals affirmed the circuit court. He now has brought his case to the Supreme Court, where he questions how a person who is sufficiently impaired to be deemed incompetent to refuse medication can be assumed to be competent to stipulate to his need for ongoing commitment to a mental institution.

The Supreme Court will determine whether a person who agrees that s/he needs to be committed for mental treatment may be committed without a colloquy.

[4] Wis. Stat. § 51.20(5)

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 28, 2005
9:45 a.m.

03AP2865 The Warehouse II, LLC v. State of Wisconsin DOT

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a summary judgment of the Winnebago County Circuit Court, Judge William H. Carver presiding.

This case involves a landowner who stopped a condemnation of his property by the Department of Transportation (DOT) by demonstrating that the DOT had not negotiated in good faith. The Supreme Court will decide whether the DOT also may be ordered to pay the landowner's litigation fees.

Here is the background: The Warehouse owned land in the Town of Oshkosh that the DOT sought to condemn for a highway project. The communications proceeded as follows:

March 7, 2002: The DOT sent Warehouse a written offer to purchase the land and an advisory about Warehouse's right to submit, within 60 days of the receipt of the letter, an appraisal.

May 5, 2002: Warehouse sent the DOT an appraisal and concluded its letter with: "[w]e are ready to engage in good faith negotiations at your convenience."

May 15, 2002: The DOT sent Warehouse a letter increasing the amount offered and stating: "[b]ecause we have been unsuccessful to date in concluding this transaction, we have no other alternative but to begin the process to acquire the needed right-of-way by Eminent Domain…." The letter continued, "[I]t is still our desire to reach a negotiated settlement."

May 16, 2002: The DOT sent another letter stating, "[u]nfortunately, WISDOT has not received your acceptance of our offer."

The DOT then exercised its power of eminent domain to condemn the property. Eminent domain[5] permits government to acquire property for a public project such as a road even if the property owner is unwilling to sell. Warehouse sued and won. The trial court concluded that the DOT had not negotiated in good faith, as state law requires. However, the judge declined to order the DOT to reimburse Warehouse's attorney fees.

Warehouse appealed, and the Court of Appeals affirmed, finding that the law only permits the shifting of attorney fees in situations where the landowner has demonstrated that the government is not entitled to condemn the property. In this case, the Court of Appeals noted, the condemnation was halted not because the landowner proved the government wasn't entitled to the land, but rather because the DOT did not negotiate properly.

Now in the Supreme Court, Warehouse argues that the DOT will have less incentive to engage in good faith negotiations with property owners if the Court of Appeals ruling is permitted to stand. The Supreme Court will determine whether attorney fees may be awarded in cases such as this one.

---

[5] See Wis. Stats. Ch. 32

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 28, 2005
10:45 a.m.

04AP2330} State v. Robert K.
04AP2331}

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a summary judgment of the Milwaukee County Circuit Court, Judge Michael G. Malmstadt presiding.

This case involves the termination of a father's rights to his twin children who are now 4 years old. The question before the Supreme Court is whether the trial court lost competency to proceed with the termination of parental rights (TPR) because of a six-month delay between the plea hearing and the trial.

The Wisconsin Statutes[6] set out a process for the termination of a person's parental rights. The first step is the filing of a TPR petition. Then, no more than 30 days later, the court must hold a hearing to determine whether any party is contesting the TPR. If the TPR is contested, the court must set a trial no more than 45 days later to determine if grounds exist to terminate the parent's rights. If, after the trial, such grounds are found to exist, the judge finds the parent unfit and the matter proceeds to disposition.

In this case, the petition for termination of Robert K.'s parental rights was filed on July 17, 2003 (there was also a separate petition to terminate the rights of the children's mother; that petition is not at issue here). The petition alleged that the children needed ongoing protection or services and that Robert had failed to assume parental responsibility. The next required hearing was begun on Aug. 8, 2003, within the 30-day window, but was adjourned to Sept. 19, 2003. Robert is not contesting the TPR on the basis of this delay. At the September hearing, the fact-finding hearing was set for March 8, 2004 – well beyond the 45-day window. The six-month delay was a result of the busy trial court schedule and the schedules of the lawyers involved. Neither Robert nor the children's attorney (the guardian *ad litem*) objected.

The trial commenced on March 8, 2004 and lasted five days, after which the jury found that grounds existed to terminate Robert's parental rights. After a final hearing, the judge ordered Robert's rights terminated.

Robert appealed, arguing that the judge lost competency to proceed with the TPR when the 45-day deadline was missed. The Court of Appeals disagreed and pointed out that the law makes allowances for "good cause" delays, but did not determine if the judge's and attorneys' full schedules constituted an excusable delay. The court instead concluded that this analysis was unnecessary because the guardian *ad litem* had not objected to the delay. The Court of Appeals wrote that the lack of objection amounted to consent, which made the delay acceptable under the law.

Robert now has appealed to the Supreme Court, where he argues that the consent of the guardian *ad litem* to a delay in a TPR case does not eliminate the need for the State to show "good cause" for missing a mandatory time limit. The Supreme Court will clarify whether a guardian *ad litem*'s consent to a delay makes the delay lawful.

---

[6] Wis. Stat. § 48.422(2)

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 28, 2005
1:30 p.m.

03AP1307 Kristy Haferman v. St. Clare Healthcare Foundation, Inc.

This is a review of a split decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a summary judgment of the Sauk County Circuit Court, Judge Daniel S. George presiding.

This case involves a 14-year-old boy who is developmentally disabled, allegedly as a result of medical malpractice. The question before the Supreme Court is whether the boy's lawsuit is barred by the statute of limitations.

Here is the background: Toby Haferman Jr. suffers from cerebral palsy that developed at birth. His parents allege that the condition developed due to the negligence of Donald W. Vangor, MD, and St. Clare Hospital. On Sept. 4, 2002, when Toby was 11, his parents sued.

In the circuit court, the defendants (the physician, the hospital, and others) sought summary judgment, asking that the case be dismissed as untimely. The judge, however, concluded that the deadline for the Hafermans to file this claim would be one year after Toby turned 18 and, therefore, the claim was permitted to move forward.

The case then was halted as the defendants appealed this ruling to the Court of Appeals, which reversed the circuit court, concluding that the statute of limitations already had run.

The statutes set out various deadlines by which injured parties must file claims against health care providers in order to preserve their right to sue. The two lower courts disagreed on which of these deadlines applies in this case.

The circuit court applied Wis. Stat. § 893.16, which governs claims by people who are under 18 or have a mental illness when their cause of action accrues. This statute generally tolls the statute of limitation for people in these circumstances. However, the wording of this statute clearly says that it does not apply to lawsuits against health-care providers.

The Court of Appeals concluded Wis. Stat. § 893.16 does not apply, and looked next at the law that governs children's claims against health-care providers. Wis. Stat. § 893.56 addresses health-care claims by minors, giving them until age 10 to file a claim, but the wording of this statute clearly says that it does not apply to people with disabilities.

"The question then remains: if Wis. Stat. § 893.16 and Wis. Stat. § 893.56 are inapplicable," the Court of Appeals majority wrote, "what statute of limitation applies?"

The majority concluded that the answer is Wis. Stat. § 893.55(1)(a), which governs medical malpractice lawsuits by adults and requires the filing of a claim within three years of the time when the cause of action accrues. Thus, because Toby's cause of action accrued at his birth, his claim was filed too late. However, the majority noted that "[t]he result in this case seems absurd and illogical" and called upon the Legislature to address the "illogical gap" in the statute of limitations in order to protect "young children with developmental disabilities caused by medical malpractice."

The Supreme Court will examine the interplay among these statutes and determine how to address this problem.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 30, 2005
9 a.m.

04AP630-CR State v. Forest S. Shomberg

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a summary judgment of the Dane County Circuit Court, Judge Patrick J. Fiedler presiding.

This case involves a man convicted of grabbing a woman who was walking late at night near the UW-Madison campus and sexually assaulting her. The man maintains he was wrongfully convicted of the crime. The Supreme Court will review the conviction and determine whether a new trial is warranted.

Here is the background: At about 3 a.m. on March 9, 2002, a UW-Madison sophomore left a party on Langdon Street and was grabbed and sexually assaulted near the Francis Street Ramp. She managed to pry the assailant's hand off her face and scream, and a private security guard who happened to be working nearby heard her screams and scared the assailant off. The guard got within about 13 feet of the man and reported that he saw his face briefly. The woman estimated that he was between 20 and 30 years old and recalled that he had blue eyes, was about 5'10" and fairly thin.

A month after the attack, police showed the guard and the victim a line-up of six men in jail garb. Both picked #5, Forest S. Shomberg, as someone who matched their memory of the assailant. The victim later testified that she was not positive that he was the one, only that he was the closest match of the six in the line-up. Shomberg was charged with second-degree sexual assault, false imprisonment, and two counts of bail jumping.

At trial, Shomberg maintained that he was celebrating his 38th birthday with his girlfriend and other friends that evening on Williamson Street and that at the hour in question he was 30 blocks east of Francis Street at the East Johnson Street apartment of one of the group and in the presence of several others. The victim and the witness, however, maintained that he was the assailant. He was found guilty and sentenced as a habitual offender to a total of 22 years behind bars and additional years of concurrent imprisonment and extended supervision.

Shomberg appealed the conviction, arguing that the trial court erred when it (1) refused to allow him to present testimony from an expert on the fallibility of eyewitness identification, and (2) refused to permit him to introduce evidence that he had offered to take a lie detector test (he passed the polygraph, as did others in the apartment who were questioned about whether he had left).

The Court of Appeals affirmed his conviction without determining whether the exclusion of the eyewitness-identification expert was error. The court concluded that it didn't matter because the potential unreliability of eyewitness identification was thoroughly explored at trial by other means. On the lie detector issue, the Court of Appeals agreed with the trial court's conclusion that Shomberg could not admit the fact that he agreed to a polygraph because he did not offer to admit that piece of evidence until he knew his results.

The Supreme Court will determine if Shomberg deserves a new trial.